Filed 6/26/12 P. v. Thompson CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LEROY BRUCE THOMPSON, Defendant and Appellant.	B231255 (Los Angeles County Super. Ct. No. PA056470)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

William Hassler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Leroy Bruce Thompson appeals from a judgment entered following his conviction by a jury trial of four counts of second degree robbery (Pen. Code,[1] § 211), eight counts of assault with a firearm (§ 245, subd. (a)(2)), and one count of attempted second degree robbery (§§ 211, 664). After a court trial, the following allegations as to all counts were found to be true: (1) a principal was armed with a firearm (§ 12022, subd. (a)(1)); (2) defendant personally used a firearm (§ 12022.53, subd. (b)); (3) defendant had suffered three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12); (4) defendant had suffered three prior convictions of a serious felony (§ 667, subd. (a)(1)); and (5) defendant had served three prior prison terms (§ 667.5, subd. (b)). The court sentenced defendant to 236 years to life plus 38 years in state prison.

On appeal, defendant contends the trial court abused its discretion in denying his *Marsden*[2] and *Romero*[3] motions, and in failing to stay the sentence on count 11 (attempted robbery). We find no ground for reversal and affirm the judgment.

FACTS

Prosecution

On the morning of April 27, 2007, Los Angeles County Sheriff's Deputy Janet Homan saw two men outside the Von's Market in Valencia. The men gave her a "bad feeling." One was wearing a white painter's jumpsuit, a yellow hat with goggles, and a paper mask, and the other had on a "security outfit [that] did not match for the area." The two men entered a branch of the Washington Mutual bank. Deputy Homan looked inside

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1 All further statutory references are to the Penal Code.

2 *People v. Marsden* (1970) 2 Cal.3d 118.

3 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

the bank and observed what appeared to be a robbery of the bank. She went inside a store next to the bank and reported the robbery to the police. At trial, she identified defendant as the man in the security outfit.

Several customers and employees in the bank at the time of the robbery testified at trial. The men took money belonging to the bank from bank employees and also took money from customers.

Teller Diane Moreno (Moreno) said two men ordered the staff to "open[] up the cabinets" and not "push any buttons." The man in white took a wallet containing $600 from bank customer Thomas Bartlette and then ordered him to lie on the floor. The same man took bank customer Mark Copado's money, which had been obtained from cashing his payroll check. The person in the white jumpsuit obtained $985 in cash from Moreno. Manager Sonia Mubaraka said the two men screamed and threatened people with a gun.

A few minutes after watching the two men enter the bank, Deputy Homan observed the two exit the bank and leave in a green four-door BMW with a handicapped license plate. Deputy Jeffrey Jackson, who responded to the call about a robbery in progress, spotted the green BMW and engaged in a pursuit, during which the BMW traveled at over 100 miles per hour. A money bag was thrown onto the street at some point. After losing sight of the BMW, Deputy Jackson found it parked by the Havenhurst Avenue off-ramp. Maria Newton (Newton) was alone in the vehicle and stated that the two men "had forced her into her car at gunpoint and told her to drive."

Canine units found defendant and Bobby Black (Black) hiding in a residential garage near the vehicle. Numerous items were recovered on the freeway along the path of the pursuit, including a brown leather tool belt and a blue windbreaker, a white gown, a white head rag, and a black hat with the word "security." A black glove was also found in an alleyway near where defendant was found. A search of the BMW revealed an envelope with written directions to the bank that was robbed. Insurance papers for the BMW in the names of Black and Newton[4] were also found inside the car.

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[4] Codefendants Black and Newton are not part of the instant appeal.

DNA found on a head rag matched Black's DNA profile. Defendant was found to have possibly been the source of the DNA found on the hat band of the black hat with the word "security."

Defense

Newton testified that she drove defendant and Black to the bank and, after they entered the car, she drove fast and recklessly, but she insisted she did not know what happened inside the bank. Newton confirmed that defendant was wearing a blue windbreaker and Black, her boyfriend, was wearing a white jumpsuit. Before the robbery, Newton got out of the car at the mall to buy coffee, and Black and defendant were gone when she came back.

When the men got back into the car, they both "ducked down" as she drove out of the parking lot. After driving fast on the freeway, she exited at a ramp and stopped. Defendant and Black left the car. She falsely told the police that they forced her to drive them because she did not want to disclose Black's name to the police.

DISCUSSION

Defendant's Marsden Motion

A defendant's Sixth Amendment right to the assistance of counsel entitles him to substitute appointed counsel """"if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result."""" (*People v. Welch* (1999) 20 Cal.4th 701, 728, citing *People v. Memro* (1995) 11 Cal.4th 786, 857.) *People v. Marsden*, *supra*, 2 Cal.3d at p. 124 gives a defendant who seeks to substitute counsel the right to a hearing to explain the reasons for the request. Once the hearing is held, the decision whether or not to allow the defendant to substitute counsel rests within the sound discretion of the trial court """"unless there is a sufficient showing that the defendant's right to the assistance of

counsel would be substantially impaired if his present request was denied.'"'" (*People v. Burton* (1989) 48 Cal.3d 843, 855; accord, *Memro, supra*, at p. 857.)

It is important to note that "[a] defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' [Citation.]" (*People v. Welch, supra,* 20 Cal.4th at pp. 728-729.)

Neither does a lack of rapport or a lack of trust between defendant and counsel require that a motion to substitute counsel be granted. (*People v. Memro, supra*, 11 Cal.4th at p. 857.) "'[T]he Sixth Amendment does not guarantee a "'meaningful relationship' between an accused and his counsel." [Citation.]'" (*People v. Clark* (1992) 3 Cal.4th 41, 100.)

In the instant case, on December 13, 2007, Thomas Burns of the Alternate Public Defender's Office was assigned to represent defendant. On April 3, 2009, the trial court denied defendant's motion to replace Attorney Burns as his counsel. The following day, the court granted defendant's motion to represent himself. On November 2, 2010, defendant relinquished his pro. per. status and the court appointed Lawrence Sperber as his counsel. Trial began with jury selection on November 13, 2010. On December 10, 2010, near the end of the prosecution's case-in-chief, defendant requested a *Marsden* hearing.

During the *Marsden* hearing, defendant indicated that he wanted his defense to be based on the fact that he was probably suffering from the effects of a blackout at the time of the bank robbery and lacked the intent to commit the crimes. Defendant complained that counsel did not want to proceed with such a defense and refused to subpoena records to support such a defense. Defendant indicated this conflict was the same conflict he had with his prior counsel and this had led him to seek pro. per. status.

The trial court observed that defendant "want[ed] to direct the defense in the case, and if you don't know the law, you're asking and telling your attorney to do things that are improper . . . ." Trial counsel added that when he was first appointed in this case, he asked whether defendant had any defenses and support evidence and defendant answered in the "negative." Defendant interrupted by saying, "Okay. Look, I can't take this. Take me to the county jail. I'm ready to go. I'm ready to go. Get me out of here, man. I'm not part of this." The trial court denied the *Marsden* motion.

Defendant claims that the trial court violated his Sixth Amendment right to counsel by refusing to grant his *Marsden* motion, because the conflict with counsel resulted in a failure to present the only possible defense theory. We disagree.

The trial court permitted defendant to explain the reason that he felt that counsel was providing inadequate representation. (*People v. Marsden*, *supra*, 2 Cal.3d at p. 124.) A defendant is entitled to new appointed counsel if the existing counsel is not providing adequate representation or if there is an irreconcilable conflict in the relationship such that ineffective representation is likely to result. (*People v. Fierro* (1991) 1 Cal.4th 173, 204.)

The trial court has broad discretion in determining whether defendant has made an adequate showing to justify the granting of the *Marsden* motion. There is no showing in the record that the trial court's denial of the *Marsden* motion was an abuse of discretion. "A defendant does not have [a] right to present a defense of his own choosing, but [simply a] right to an adequate and competent defense." (*People v. Welch*, *supra*, 20 Cal.4th at p. 728.) In addition, a defendant who has professional representation "has no right to participate as cocounsel." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.)

Simply stated, defendant's proposed defense of blackout was incredible in light of the evidence presented. The robbery was clearly planned before it was committed. There were directions to the bank in the BMW. Defendant and Black were wearing costumes suspicious enough to draw the attention of a sheriff deputy. Evidence of the crime was thrown from the vehicle during the escape. Defendant ran from the vehicle after the pursuit and hid until he was located by canine units. Trial counsel had a right to refuse to

adopt any defense which he believed to be untenable. (See, e.g., *People v. D'Arcy* (2010) 48 Cal.4th 257, 286.)

In light of the evidence presented, defendant has not shown how he was prejudiced by his counsel's refusal to present a blackout defense. He thus has failed to demonstrate an abuse of discretion in the denial of his *Marsden* motion. (*People v. Henning* (2009) 178 Cal.App.4th 388, 405.)

Romero Motion

When, as here, a defendant is sentenced under the "Three Strikes" law, the sentencing court retains the discretion under section 1385, subdivision (a), to strike the prior convictions in the interests of justice. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 505, 529-530.) Because a decision to strike or not to strike prior convictions lies within the discretion of the trial court, we cannot reverse that decision except for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

The abuse of discretion standard is a deferential one. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The question is whether the trial court's action "'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Ibid*.) That is, whether the trial court's action is one which would not have been taken by a reasonable judge (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 530-531) or the trial court has acted "in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316; *People v. Franco* (1994) 24 Cal.App.4th 1528, 1542-1543.)

Additionally, "'[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."

[Citations.]' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978; accord, *People v. Carmony*, *supra*, 33 Cal.4th at pp. 376-377.)

In deciding whether to dismiss prior convictions under section 1385, subdivision (a), the trial court must consider the defendant's background, the nature of his current offense and other individualized considerations (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 531; *People v. Dent* (1995) 38 Cal.App.4th 1726, 1731), including all of the relevant factors, both aggravating and mitigating (*People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274; see *People v. Jordan*, *supra*, 42 Cal.3d at p. 318). It must determine whether, in light of the defendant's present and past offenses, "and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as thought he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams*, *supra*, 17 Cal.4th at p. 161; accord, *People v. Carmony*, *supra*, 33 Cal.4th at p 377.)

Defendant contends that the trial court abused its discretion in denying his *Romero* motion. He argues that the court should have given greater weight to the length of his sentence, his age (65 at the time of sentencing), and his fragile medical condition (brain lesions, seizures, blackouts and strokes). Advanced age is not necessarily a mitigating factor. (See *People v. Strong* (2001) 87 Cal.App.4th 328, 332 ["middle age, considered alone, cannot take a defendant outside the spirit of the law; otherwise, the very factor that takes a defendant within the spirit of the law—a lengthy criminal career with at least one serious or violent felony—would have the inevitable consequence—age—that would purportedly take him outside it"].)

Here, the court could not overlook the failure of any prior rehabilitative efforts by defendant. He continued to commit criminal offenses over the course of his life. The trial court, in considering the *Romero* motion, clearly exercised its discretion. In part, the trial court stated:

"In *People* [*v.*] *Williams*, [*supra*], 17 Cal.4th 148, it held that the court must consider that the nature and circumstances of the defendant's present felonies and prior

serious or violent felony convictions and the particulars of the defendant's background, character, and prospects that defendant may be deemed outside the spirit of the scheme of the Three Strikes law in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious or violent felony convictions. I did take note from the pre-plea report that the defendant has an adult history, as far as convictions are concerned, back to 1966.

"He has suffered five prior felony convictions in which he received substantially lengthy terms. For example, in 1980 a five-year plus 25-year consecutive sentence; in 1988, a five-year plus 25-year consecutive sentence that occurred. And in 1994, a 30-year sentence in which he was on probation at the time of the commission of this offense. Based upon the law and the facts I have before me, I cannot say the defendant is outside the spirit of the scheme of the Three Strikes law at all, and the motion to strike or more of the prior convictions is denied." He stands now convicted of yet another bank robbery, a planned armed robbery of a bank where both customers and bank employees were robbed at gunpoint.

During the sentencing hearing, defendant indicated that his record of prior convictions was not correct. He stated that in 1980 he was convicted of a charge and was incarcerated from 1980 until 2004. He stated that he was not convicted or arrested in 1988 or 1994. Even assuming defendant was correct, his record certainly justified the trial court's refusal to grant his *Romero* motion. The trial court, during a court trial on the prior violations, found true that defendant had suffered three strike convictions in 1966, 1973 and 1980. If, in fact, defendant was not released from prison until 2004 and did not commit any offenses in 1988 or 1994, he was not released from custody for a significant period of time from 2004 until 2007 when he committed the current offenses.

We find defendant's overall record and recidivism constituted a sufficiently compelling reason for the trial court to deny his *Romero* motion. (See *People v. Strong*, *supra*, 87 Cal.App.4th at p. 338 ["the overwhelming majority of California appellate courts have reversed the dismissal of, or affirmed the refusal to dismiss, a strike of those defendants with a long and continuous criminal career"]; see also *People v. Carmony*,

supra, 33 Cal.4th at p. 378 [“‘[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance’”].)

Defendant’s conduct was clearly indicative of his prospects—his persistent unwillingness or inability to comply with the law. Indeed, despite his argument of his ill health and age, defendant appears to be “an exemplar of the ‘revolving door’ career criminal to whom the Three Strikes law is addressed.” (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) The fact that the sentence imposed by the trial court will result in defendant spending the rest of his life in prison is a reason defendant should have considered before continuing his criminal behavior. The trial court’s determination that defendant did not fall outside the purview of the Three Strikes law—and to the contrary, exemplified the need for the law—was well within its discretion.

Failure of Trial Court to Stay Count 11 (Attempted Robbery)

Defendant contends the trial court violated section 654,[5] which prohibits punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of conduct (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1208; *People v. Harrison* (1989) 48 Cal.3d 321, 335), by imposing separate sentences for the robbery (count 3) and attempted robbery (count 11) as to a single victim, Moreno. According to defendant, since the two acts were made pursuant to a single objective to rob money from the same victim, the court should have stayed count 11 pursuant to section 654.

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[5] Section 654, subdivision (a), provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

"The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335; accord, *People v. Vu* (2006) 143 Cal.App.4th 1009, 1033.) "'The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple.' [Citation.] 'A defendant's criminal objective is "determined from all the circumstances . . . ." [Citation.]' [Citation.]" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466, disapproved on another ground in *People v. Mesa* (June 4, 2012, S185688) ___ Cal.4th ___ [2012 Cal. Lexis 5204].) Its findings will not be reversed on appeal if there is any substantial evidence to support them. (*Hutchins*, at p. 1312; *Herrera*, at p. 1466; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) "We review the trial court's determination in the light most favorable to the [defendant] and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [trial court's finding of "'separate intents'" reviewed for sufficient evidence in light most favorable to the judgment].)

In the instant case, after Moreno was robbed of $985 cash she had obtained from the bank's cash dispenser for a customer the first time (count 3), the robbers sought cash

from other cash dispensers. A later effort to obtain more cash from Moreno's dispenser was accompanied by a verbal threat. Moreno testified that the acts occurred within a "very, very short amount of time."

In *People v. Nubla* (1999) 74 Cal.App.4th 719, on which the People rely, the defendant committed several acts of violence against his wife, and the appellate court held it was not error to impose multiple sentences for assault and corporal injury on a spouse. The court stated that the offenses were "somewhat analogous to sex offenses in that several similar but separate assaults occurred over a period of time." (*Id*. at p. 730.) The court stated that just as "each sexual assault may be viewed as a separately punishable criminal act, notwithstanding that all the offenses arguably were done to obtain sexual gratification," (*ibid*.) because "'"[n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental" to any other'" (*id.* at p. 731), the defendant's separate assaults were not done to facilitate each other and were not incidental to each other. Accordingly, "[t]he trial court was entitled to conclude that each act was separate for purposes of . . . section 654." (*Ibid*.)

Similarly here, the first robbery was completed and other robberies committed before defendant returned to attempt to rob Moreno a second time. The two robberies were not committed to facilitate the other; neither was one incidental to the other.

By contrast, in *People v. Marquez* (2000) 78 Cal.App.4th 1302, on which defendant relies, "In one seamless ill-conceived effort, [the] defendant walked up to the counter at [a] [r]estaurant, threatened [the] waitress . . . with a handgun, thereby convincing her to hand over her tips lying on the counter and [the restaurant's] operating money from the cash drawer. This was an indivisible transaction involving a single victim who was forced to relinquish possession of two separately owned amounts of money at the same place and at the same time." (*Id*. at p. 1307.) The trial court "erred in sentencing [the] defendant for committing two robberies when only one occurred." (*Id.* at p. 1308, italics omitted.)

The facts in the instant case are distinguishable from *Marquez*. Although the offenses occurred in a brief period of time, defendant had committed the first robbery of Moreno, and then the attention was focused on other cash dispensers. After that, defendant returned to Moreno and attempted to rob her again. The acts were not committed in "one seamless ill-conceived effort" as in *Marquez*. (*People v. Marquez, supra*, 78 Cal.App.4th at p. 1307.)

Finally, the case of *People v Trotter* (1992) 7 Cal.App.4th 363 supports separate punishment. In *Trotter*, the defendant was driving a vehicle with a police officer in pursuit. Three times during the course of the pursuit, the defendant fired at the officer. (*Id*. at p. 366.) The defendant was convicted on three counts of assault with a firearm on a peace officer. The trial court sentenced him consecutively on all three counts. He contended that under section 654 he could be sentenced on only one of the counts. (*Id*. at pp. 365, 366.)

The court noted that each assault was a separate volitional act. Each was separated from the others by a period of time in which reflection and consideration was possible. Each posed a separate and distinct risk to the pursuing police officer. Each "evinced a separate intent to do violence." (*People v. Trotter*, *supra*, 7 Cal.App.4th at p. 368.) The court concluded that the defendant should not be rewarded with only one punishment for the three assaults "'where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.'" (*Ibid*., quoting from *People v. Harrison*, *supra*, 48 Cal.3d at p. 338.) It therefore upheld separate and consecutive punishment on each of the three assault counts. (*Trotter*, *supra*, at p. 368.)

The same is true here. Defendant could have stopped his crimes after each robbery, but he did not. He went to another cash dispenser or victim. The trial court's refusal to apply section 654 to count 11 is supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.